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The Current Legal Basis and Governance Structures of the EU's External Action

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ENVISIONING A NEW GOVERNANCE ARCHITECTURE FOR A GLOBAL EUROPE

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Executive Summary

This Working Paper explores the current legal basis and governance structures of the European Union's (EU) "external action plus". In our understanding, the notion of "external action plus" not only includes the foreign, security and defence policy, trade, sanctions policy, development cooperation or humanitarian aid but also EU sectoral policies with an external dimension. In line with this definition, this Working Paper presents both the traditional external action areas of common commercial policy, sanctions policy and development cooperation and humanitarian aid, as well as the external dimension of some internal policy areas, including competition, health and environment. Despite several Treaty amendments, the EU's external actions are still fragmented and competences are scattered throughout the two Treaties. The list of common objectives under Article 21(2) of the Treaty on European Union (TEU) or the dual role of the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) are clear attempts to overcome the "bipolarity" of EU external actions. The continued existence of different legal bases that enable the Union to act externally still represents a significant challenge for EU policymakers.

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1 Introduction[1]

The ENGAGE project examines how the European Union (EU) can effectively and sustainably meet strategic challenges by harnessing all its tools to become a more assertive global actor. The current Working Paper is part of a set of three papers that aim to provide a summary of the legal and governance structure for EU external relations.[2] By addressing the ground rules, the three papers aim to not merely address the boundaries for proposals to enhance the functioning of the EU as a global actor, but also to reveal the possibilities that are offered by the existing legal framework. This Working Paper defines the notion of "EU external action plus" broadly encompassing CFSP/CSDP,[3] trade, development and humanitarian aid and sanctions but also the external dimension of some "internal EU policies", such as competition, health and environment. The latter dimension, in particular, explains the "plus" in our notion, and refers to the external dimensions of various internal EU policies, given that the Union's engagement with the rest of the world goes beyond areas in the Treaties defining EU external relations.

It is a truism that the Lisbon Treaty has profoundly changed the EU and its external actions and has contributed to making the Union a more coherent foreign policy actor. It provided the Union with legal personality, abolished the pillar structure that was established by the Maastricht Treaty and strengthened and even created new foreign policy actors, including the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP), the European External Action Service (EEAS) and the President of the European Council. The EU replaced and succeeded the European Community (EC),[4] and the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have now equal legal weight and together with the Charter on Fundamental rights form the foundational documents of the EU. The Common Foreign and Security Policy (CFSP) is no longer a separate pillar but is brought together with the general provisions on the Union's external relations action in Title V TEU. Moreover, there are no longer CFSP and non-CFSP objectives, as Article 21(2) TEU applies across policy sectors. Altogether, the legal image of a more coherent actor has started to become realised since 2009.

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[2] See D4.1 on "Mapping the current legal base and governance structures of the EU's defence activities" and D5.1 on "Mapping the current legal base and governance structures of the EU's CFSP".

[3] See separate Working Papers on CFSP/CSDP in the previous footnote.

[4] Article 1(3) TEU.

Despite the Lisbon Treaty's laudable reforms, however, there is a widespread belief that EU foreign policy does not live up to its expectations. This is partly due to the "continued bipolarity" (Dashwood, 2014) of EU external actions: the Lisbon Treaty has retained CFSP in the TEU – as the only substantive policy area in that Treaty (next to the European Neighbourhood Policy) – while it has placed all other external relations provisions in the TFEU. And although we have been clearly witnessing the "normalisation" of the CFSP in the EU legal order (Wessel, 2020), foreign and security policy creates a "world of its own" and the separation of external actions between the two Treaties "leave[s] practitioners with a perplexing assortment of legal arrangements for the Union in a range of different areas when the Union acts externally" (Butler, 2019, p. 2). As a result, different policy areas often have significantly different legal bases as well as different governance structures. Such divergences (including legal competences) can play an important role in determining the extent to which EU external action can be more joined-up in practice across these policy areas. Moreover, several internal policies have external dimension which may further complicate the Union's external actions and the choice of correct legal basis.

This Working Paper is structured as follows. First, it shows how EU external relations are governed by the current Treaty provisions and, in particular, how their different place in the Treaties affect the overall functioning of EU external relations. Despite the "normalisation" of the CFSP (which, *inter alia*, is visible in the combined objectives, the increasing combination of CFSP and other external policies and the more active role of the Court of Justice in this area), it is – along with Common Security and Defence Policy (CSDP) – separated from other external actions and remains subject to "specific rules and procedures" as indicated by Article 24(1) TEU. Second, the Working Paper addresses the rules on other external EU policies, especially trade, sanctions, development and humanitarian aid. Third, it presents the external dimensions of three sectoral policies where the EU has different competences (exclusive, supporting and shared): competition, health and environment policies. The paper concludes with a summary of the findings.

2 A Brief Historical Overview of EU External Relations Law

EU external relations policies have developed in quite different ways and times. The unequal historical development of these policies still has its imprint on primary EU law, and the case law of the Court of Justice of the European Union (CJEU) reveals a constant stream, that mainly points to problems related to questions over who has competence to act externally (the EU or its Member States, and in case of the EU, which institution) (see for a selection of 92 fundamental cases, Butler & Wessel, 2022). A short historical overview, therefore, contributes to understanding of how EU external relations are currently organised and governed by primary EU law. As this Working Paper will demonstrate, EU external relations policies – mainly due to historical reasons – are still spread over two separate Treaties. This "two Treaty solution" (Cremona, 2012) has offered a less efficient foreign policy but has brought a comforting result for those Member States that wished to avoid further integration of the CFSP into the EU's legal order. At the very same time, this solution has prevented the EU from acting as a truly coherent actor despite the Lisbon Treaty's laudable intentions to make the EU a more visible and effective actor in international relations.

The 1957 Rome Treaty contained express external powers in two policy areas only: the Common Commercial Policy (CCP) and the conclusion of Association Agreements (Cremona, 2018b, pp. 5–6). It was only in the beginning of the 1970s that EC Member States established the European Political Co-operation (EPC), which served as a loose framework for foreign policy coordination without, at the time, a legal basis in the Treaties. Cooperation in "high politics" developed only incrementally, outside the Treaty framework and was careful in its approach in the sense that the creation of the EPC did not alter the division of competences between the European Community (EC) and its Member States but instead placed Member States in the centre of decision-making – what many would call an intergovernmental policy area. In the EPC, "supranationalism" was excluded: Community institutions were given no role and unanimity prevailed in order to prevent the Community from taking (political) decisions which would run contrary to vital Member State (foreign and security policy) interests. Moreover, given the political nature of the EPC, the Community did not produce law in this area, not even when the EPC received Treaty status on the basis of the 1986 Single European Act. The EPC was mainly developed through political documents and was, therefore, studied mainly by political scientists (Wessel, 1999, 2015, p. 306; see early political science literature Nuttall, 1992, 2000; Wessels, 1982). For a very long time, foreign policy and law seemed to be very different within the EU, and legal questions on the EU's external relations only arose in relation to trade issues.

The 1993 Maastricht Treaty created the so-called pillar structure and thus clearly maintained a distinction between different areas of activities: the first encompassing the EC, the second the CFSP and the third Justice and Home Affairs (JHA). This distinction was reflected also in the Treaty framework: the EU was essentially based on two Treaties, the EC Treaty and the TEU. The CFSP was placed in the latter (along with JHA) indicating that the second and third

pillars had fundamentally different legal characteristics compared to the EC legal order.[5] Moreover, the EC Treaty had priority over the TEU which was explicitly stated in Article 3(1) EC Treaty: "[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty". This imbalance between the (old) TEU and the EC Treaty was reflected in a number of Treaty provisions, in particular in (old) Article 47 TEU which protected the *acquis communautaire* from incursion by the special CFSP method (Wessel, 2020, p. 288), and provided that "nothing in [the TEU] shall affect the Treaties establishing the EC or the subsequent Treaties and Acts modifying and supplementing them".[6] In other words, (old) Article 47 TEU established an asymmetrical protection of the EC policies from encroachment by the CFSP (Koutrakos, 2017, p. 61).

Despite the establishment of a *common* foreign and security policy[7] in the 1990s, there was an increasing need in the new century to strengthen the EU's position in the world by reorganising and recalibrating the position of external actions in primary EU law and by closing the gaps between CFSP and non-CFSP areas. The Convention on the Future of Europe was convened in early 2002 which was responsible for drafting a constitution for the EU. The Convention's primary objective, especially in the domains of external action, was to make the EU a more effective and coherent actor in international relations. One of the ways in which the Convention envisaged the creation of more effective and coherent external action was to finally end the historical division between CFSP and non-CFSP areas and group them under a single Title. As Marise Cremona put it: "[t]he underlying feature of the draft Treaty [was] perhaps its attempt at integration: the integration of the EC and [EU] Treaties, the integration of the pillar structure, the integration of the policy under one rubric […] and the integration of that action into the overall perspective of the Union's objectives" (Cremona, 2003). However, the further integration of CFSP into non-CFSP domains strongly divided the Member States whose final choice was to continue the division between the two areas (Thym, 2004; Wouters & Ramopoulos, 2013, pp. 219–220). While 18 Member States successfully ratified the Constitutional Treaty, it was refused by French and Dutch referendums. Subsequently, the British government announced it would suspend the ratification process. In reaction to these negative tendencies, the German and French governments sought to recuperate as much as possible of the Constitutional Treaty and decided to convene another Intergovernmental Conference in an attempt to continue the reform process of the EU. As a result, the Lisbon Treaty was formally signed by EU Member States in late 2007 which has successfully reformed the functioning of the EU, including its external actions (Devuyst, 2012, pp. 164–165).

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[5] Although some argued that the pillars were rather connected (see e.g. Bogdandy, 1999; Bogdandy & Nettesheim, 1996; De Witte, 1998; Deirdre & Dekker, 2011).

[6] See further on (new) Article 40 TEU in section 3 of this Working Paper.

[7] Note that some authors call into question the extent to which the CFSP can be considered as a 'common' policy, especially if one compares it with the common commercial policy (see e.g., Keukeleire & Delreux, 2014, p. 157).

3 The Current Legal Framework of EU External Actions: A Bird's Eye View

The 2005 Constitutional Treaty never came into force and its innovative solution of grouping all external actions under a single title was also rejected. The EU – even after the adoption of the Lisbon Treaty in 2007 – continues to be based on two treaties: the TEU and the TFEU. They together constitute the "Treaties" on which the Union is founded (Article 1 TEU and Article 1 TFEU). The TEU with its 55 articles is the shortest of the two EU Treaties and is considered the framework treaty. It sets out the most fundamental legal properties of the EU: the aims and objectives for which it was set up, which of its organs has what role in making decisions binding on legal persons, essential principles of conduct within the organisation, how to leave or become a member of the Union and how its constitutional rules can be changed. The TFEU, in comparison, as is clear from its name and with its 358 articles, "fleshes out" the functioning of the EU. It regulates in which areas the EU institutions can adopt measures in pursuit of the external objectives set out in the TEU, which procedures should the institutions adhere to, which (legally) binding instruments they can use, etc (Wessel & Larik, 2020, pp. 8–9). It also contains all policy areas (apart from CFSP and the European Neighbourhood Policy).

This "two treaty solution" (Cremona, 2012) has important repercussions on how external relations are now organised in the Treaties. In fact, the only area of activity that is scattered throughout the two Treaties is EU external relations. The CFSP (including the CSDP) continues to be placed in the TEU (which in itself shows that the Treaty drafters sought to differentiate CFSP from non-CFSP areas), while other areas of external action, including trade, development or humanitarian aid, are in the TFEU. The fragmentation of the EU's external relations is one of the obstacles in defining a consolidated policy. As Robert Schütze argued: "the Union […] suffers from a 'split personality' […]. It has a general competence for its [CFSP] within the TEU; and it enjoys various specific external powers within the TFEU" (Schütze, 2012, p. 189). In comparison with the (failed) 2005 Constitutional Treaty, the Lisbon Treaty is a step back and constitutes a "suspended step" towards integration (Wouters & Ramopoulos, 2013, pp. 221-227). Pillar talk cannot as yet be entirely avoided because of the noticeable differences between CFSP and other EU policies. Among other things, these differences extend to decision-making procedures, the role of EU institutions, the types of (non-)legislative acts and the nature of competences (Eeckhout, 2012, pp. 265–266). In fact, the CFSP has remained a competence distinct from others with regard to its procedures and instruments (Wouters & Ramopoulos, 2013).

Table 1: The Union's "Split Personality"

Title V of the TEU	Part Five of the TFEU – The Union's External Action
Chapter 1 – General Provisions on the Union's External Action	Title I – General Provisions on the Union's External Action
Chapter 2 – Specific Provisions on the CFSP • Section 1: Common Provisions • Section 2: CSDP	Title II – CCP
	Title III – Cooperation with Third Countries and Humanitarian Aid
	Title IV – Restrictive Measures (sanctions)
	Title V – International Agreements
	Title VI – Union's Relations with International Organizations and Third Countries and Union Delegations
	Title VII – Solidarity Clause

Source: Schütze (2012, p. 191)

At the same time, we have to move beyond pillar talk in the post-Lisbon era. The three pillars established by the Maastricht Treaty were abolished by the Lisbon Treaty in an attempt to unify the EU's legal order. This unification is best exemplified by the creation of a single legal personality under Article 47 TEU. The EU replaced and succeeded the Community,[8] and the TEU and the TFEU now have equal legal weight.[9] While the notion of external relations used to refer to EC external policies and was different from the CFSP (and especially from the EPC) pre-Lisbon, with the coming into force of the Lisbon Treaty, the EC and its powers were subsumed into the EU, and primary EU law now brings together all external relations policies under the general heading of the "Union's external action". Thus, external relations now include trade and development policy as well as sectoral EU policies with an external dimension, such as environmental or transport policy (Cremona, 2016, p. 373).

Some issues are dealt with by provisions in both Treaties. In the area of external relations, for example, a traditional example is the use of sanctions: the imposition of economic and financial sanctions on the basis of Article 215 TFEU is pre-conditioned on a unanimous foreign policy decision based on Article 29 TEU. Another example is the European Neighbourhood Policy (ENP) under Article 8 TEU which refers to the EU's ability to conclude international agreements under Article 218 TFEU (Cremona, 2012, p. 46). And, while a collective defence clause can be found (somewhat hidden) in Article 42(7) TEU, a similar and related solidarity

[8] Article 1(3) TEU.

[9] The simplified revision of the Treaties only applies to the TFEU which, in some aspects, shows an imbalance between the two legal texts.

clause is positioned at the far end of the other Treaty, in Article 222 TFEU. Political compromises do not always make sense in legal terms.

Yet, EU external relations are now indeed somewhat more concentrated in comparison to the pre-Lisbon situation (Cremona, 2011; De Witte, 2008) and, more importantly, are more closely knit together. Thus, separate CFSP and non-CFSP objectives no longer exist and instead a bridge was created by including unified principles and objectives for all EU external relations policies. Articles 3(5) and 21 TEU – laying down the objectives of the Union – apply to both CFSP and non-CFSP areas and give a double response to the question as to what kind of international actor the EU is and how it relates to the international order. On the one hand, these provisions in the TEU impose substantive requirements on EU external relations by stating that there are certain fundamental objectives which shall guide its internal and external policies. On the other hand, these provisions also impose a strong methodological imperative upon EU international action: it must pursue its action through a multilateral approach based on the rule of law. It is then also clear that the scope of objectives which EU action in the world must pursue is extraordinarily broad. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives (Wessel & Larik, 2020, p. 11). Furthermore, Article 21(3) TEU establishes a legal connection between all EU internal and external policies (Wessel, 2018, pp. 345–346).

Article 3(5) TEU

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 21(3) TEU

The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

Article 205 TFEU, which serves as the chapeau for Part V TFEU (Craig & de Búrca, 2015, p. 318), declares that:

Article 205 TFEU

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

Article 21(2) TEU

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international legal system based on stronger multilateral cooperation and good global governance.

The list of common objectives is generally considered a welcome development in EU external actions and is often seen as an attempt to overcome the duality between CFSP and non-CFSP external actions (Wouters, 2021, p. 364). However, legal scholarship has raised legitimate concerns over the question of determining the scope of different EU policies: how to delimit CFSP from other EU policies? What are the boundaries of EU external relations policies? While these uncertainties have reasonable grounds, a distinction can be made between the objectives listed under Article 21(2) TEU. Some of the objectives can be directly linked with certain EU policies. For instance, objective (c) is the closest to what CFSP is supposed to achieve, while objectives (d) to (g) refer mostly to development cooperation, trade, environmental protection and humanitarian aid. Other objectives, however, are indeed more of a cross-sectoral nature, such as objectives (a), (b) and (h) (Eeckhout, 2011, pp. 168–169). However, as Marise Cremona argued, "there is nothing in the text to set apart any of the objectives listed in Article 21(2) as being particularly concerned with the CFSP" (Cremona, 2018c, p. 15). The Court also refrained itself from determining the scope of the CFSP by declaring specific objectives linked to the CFSP. Instead, the Court has preferred the explicit external competence over an implied power derived from an internal competence (Cremona, 2018c, p. 15).

Thus, in many cases, it is difficult to determine whether a decision needs to fall under the TEU or TFEU. In fact, as some of the EU's recent actions have demonstrated, commercial policy forms part of the broader foreign policy toolbox and, in certain instances, it can hardly be separated from the EU's CFSP objectives. A recent example includes the EU's proposal for a new anti-coercion instrument which will enable the EU to use (trade-related) countermeasures in a new geopolitical environment (European Commission, 2021e). Still, given that external

relations are constitutionally separated in the sense that they are spread between the two Treaties (Eeckhout, 2011, p. 501), taking decisions on the basis of either the TEU or the TFEU is crucial. And although CFSP intends to cover *all* areas of foreign and security policy,[10] it is clear that many Union actions cannot be adopted within the framework of the CFSP. The reason this distinction matters is that the choice EU institutions make has obvious repercussions on decision-making procedures or the degree to which certain EU institutions are involved in policymaking processes. Clearly, the Commission and the Parliament seek to avoid situations where Union actions are considered "CFSP issues" at the expense of their rights guaranteed by the Treaties, especially under TFEU policies.

A classic example of how the blurred boundaries between trade and foreign policy led to key litigations before the Court was the use of economic sanctions. Restrictive measures – the EU's official notion for sanctions – are in fact commercial policy tools but they are applied to achieve broader foreign and security policy objectives. The dichotomy between the nature of economic sanctions and their objectives created tensions in the EU's legal order given that the potential use of exclusive Union powers in commercial policy would have prevented the Member States from pursuing foreign policy objectives which are disconnected from Community legal obligations – what many would call a 'reserve of sovereignty' of States (Koutrakos, 2000). The issue was settled after a number of Court judgments so that the use of economic sanctions was declared to be covered by the wide scope of commercial policy.[11]

The case of sanctions may seem a particular example of EU external relations but it still shows, from a wider perspective, how the differentiation of external relations policies, both in terms of their place in the Treaties and the EU's altering competences in these fields, may bring conflicts into the EU's constitutional architecture (Szép, 2019). Therefore, the choice of legal basis continues to hold great importance given that the effects of legal instruments or the applicable procedure may vary greatly (Wessel, 2021). In fact, the question of "who decides" remains one of the central concerns in EU external relations (Butler, 2019, p. 1). As the Court reminded us in *Tanzania*:

> The choice of the appropriate legal basis of a European Union act has constitutional significance, since to proceed on an incorrect legal basis is liable to invalidate such an act, particularly where the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed.[12]

Pre-Lisbon, choices for the correct legal basis were to be made on the basis of (old) Article 47 TEU. This so-called "non-affect clause" had as its main purpose to "protect" the *acquis*

[10] See the second intent of Article 24(1) TEU.

[11] Judgment of 17 October 1995, Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany, C-70/94, EU:C:1995:328; Judgment of 17 October 1995, Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer, C-83/94, EU:C:1995:329; Judgment of 14 January 1997, The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England, C-124/95, EU:C:1997:8.

[12] Judgment of 14 June 2016, Parliament v Council, C-263/14, ECLI:EU:C:2016:435, para. 42.

communautaire from incursion by the special CFSP method and provided that "nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them". The landmark case at that time was *ECOWAS* (or Small Arms and Light Weapons).[13] The result of the *ECOWAS* case was that the Council's CFSP Decision was annulled because it also included aspects of development cooperation, an area that was not covered by the CFSP legal basis (Hillion & Wessel, 2009; Wessel, 2021).

Post-Lisbon, the pillars no longer exist, and Article 47 TEU has been replaced by what is now Article 40 TEU. The current provision reflects the current focus on coherent EU external relations and is therefore more balanced between the TFEU policy fields and the CFSP. Article 40 TEU – what Marise Cremona labelled as the "Chinese wall" between EU policies (Cremona, 2008, p. 45) – safeguards the (old) separation between CFSP and other Union policies but after Lisbon intends to protect both sides. It provides that neither the CFSP nor other EU external actions should affect each other. In other words, after Lisbon, not only shall CFSP measures not encroach on another Union competence, but the exercise of the latter also shall not encroach on CFSP competence. Both types of competence are given equal weight which is also supported by the fact that the TEU and TFEU have the same legal value (Articles 1 TEU and TFEU) (Cremona, 2008, pp. 44–46).

Article 40 TEU

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

The Court has established two criteria for defining the correct legal basis of a legislative act. First, the centre of gravity test in which the Court examines the aim and the content of an act whereby the preamble is a decisive factor to define the main aim and purpose. Second, exceptionally, two or more legal bases can be combined if several objectives of a legislative act are inextricably linked, no hierarchy between the norms exist and they are compatible in their respective legislative procedure (Ott, 2020, pp. 89–92).

Despite uncertainties on delimitation between different EU policies, the Lisbon Treaty has altogether improved the provisions on external relations. For instance, the revised CCP provision in Article 207 TFEU has, to some extent, increased the clarity over its scope and has

[13] Judgment of 20 May 2008, Commission v. Council, Case C-91/05.

ensured greater involvement of the European Parliament (see details in this regard in the next section) (Cremona, 2008, p. 47, 2017, p. 15). The provisions on CSDP are extended and its scope is particularly well defined at least compared to the CFSP, which is supposed to cover *all* areas of foreign and security policy (Eeckhout, 2011, p. 168). As a further novelty, the Union is now explicitly given competence in the field of humanitarian aid under Article 214 TFEU.

Despite the Lisbon revisions and Treaty drafters' laudable efforts to rationalise external relations provisions, legal scholarship has pointed out that the EU Treaties are still fragmented. This is due to the fact that almost all internal policies also have an external dimension. Thus, sectoral policies with external dimension, including energy, environment or transport policy, are to be found in the respective Treaty chapters and are excluded from Part V of the TFEU on the Union's external action. In the areas for energy or transport policy (the latter being an often cited area of activity for implied external competence since the famous *ERTA* case) (see Govaere, 2022), the Treaty drafters decided not to codify external powers in those provisions while they also set transport outside the scope of the CCP.[14] On the contrary, however, in the areas of environmental policy or research and development, the conclusion of international agreements is explicitly stated within the context of international cooperation.[15] In the Area of Freedom, Security and Justice (AFSJ), there is neither explicit external competence nor is this area of activity placed within Part V of the TFEU.[16] Despite the reluctance of Treaty drafters, Article 216 TFEU (with a combined legal basis of 79(3) TFEU) serves as the basis for external agreements in this field. A further fragmentation is the way in which the Union approaches different groups of third countries: the agreements concluded with ENP partner countries are not placed in Part V of the TFEU. Also, relations with Associated Countries and Territories (Articles 198-204 TFEU) and more general associations (Article 217 TFEU) are separated from economic, financial and technical cooperation; development cooperation and the CCP, the consequence of which is a tendency to define new legal bases for different categories of relationship (Cremona, 2008, pp. 46-50).

[14] Although see below Opinion 2/15 and its implications on transport.
[15] Article 191(4) TFEU and Article 186 TFEU.
[16] There is one exception on readmission agreements in immigration policy.

4 External Actions

4.1 Common Commercial Policy

The CCP is clearly one of the most robust and powerful external policies of the EU. It was developed in the early days of European integration as "a necessary corollary for the maintenance of its internal market" (Larik, 2020, p. 210) and currently belongs to one of the few EU exclusive competences under Article 3(1) TFEU. As the previous section has demonstrated, the CCP is now integrated as part of EU external relations and, therefore, trade measures are used to pursue both trade and non-trade goals. Its relevance is also demonstrated by the volume in EU trade: in 2019, the total level of trade in goods (EUR 4071 billion) was just slightly lower than that of China (with EUR 23 billion more compared to the EU) but was considerably above that of the United States (with EUR 308 billion less than the EU) (Commission, 2020). As the Preamble to the TFEU also shows, the CCP does not regulate trade between EU Member States but instead intends to contribute to international trade.

Preamble in the TFEU

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade …

Trade is perhaps one of the best examples of an internal policy (the free movement of goods and services) in which the external dimension has developed significantly over the past decades. Also, the scope of the CCP has been drastically increased through successive Treaty amendments and interpretations of the CJEU. In the early days of European integration, the CCP was concerned with trade in goods. It was a policy area established to guarantee the (evolving) customs union and the internal free movement of goods. The possible extension to cover trade in services was raised in the early 1990s due to the increased importance of services within the internal market legislative programme and the Uruguay Round negotiations, which preceded the establishment of the WTO. The broadening of the scope of the CCP can be largely explained by the increasing process of internal harmonisation with the EU's single market as well as by the desire to follow the process of trade liberalisation within the GATT/WTO. The Court in its Opinion 1/94[17] accepted only "modes of supply" of services that fell within the scope of the CCP. The Amsterdam Treaty fell short to revise the scope of the CCP and include trade in services and trade-related intellectual property rights. A few years later, the Nice Treaty addressed both trade in services and the 'commercial aspects' of intellectual property rights (Cremona, 2017, pp. 13–15). As a result of this long evolution, Article 207(1) now includes services, commercial aspects of intellectual property and foreign direct investment (FDI) (Larik, 2020).[18]

[17] Opinion of the Court of 15 November 1994.

[18] See also Opinion 2/15 in that regard (Cremona, 2018a).

Article 207(1) TFEU

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

With the entry into force of the Lisbon Treaty, decision-making procedures have also changed. The empowerment of the European Parliament is clearly one of the most visible reforms: the Parliament is fully involved in the adoption of domestic framework legislation and has consent power in relation to trade and investment agreements.[19] First, compared to the previous practice of CCP decision-making subject to special rules, the Lisbon Treaty has integrated the CCP under the ordinary legislative procedure with the full involvement of the European Parliament.[20] Article 207(2) TFEU provides that autonomous measures which "define the framework" for implementing the CCP should take the form of regulations. However, more specific measures can be adopted through implementing and delegated acts. This latter is also a major shift in decision-making procedures given that the day-to-day management of the CCP, including the adoption of specific measures (such as e.g. imposing a specific anti-dumping duty) has moved from the Council to the Commission (Cremona, 2017, pp. 42–44; Horváthy, 2019).

Article 207(2) TFEU

The European Parliament and the Council, acting my means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

As far as international trade agreements are concerned, decision-making follows the procedure laid down in Article 207(3) TFEU which, therefore, deviates from the general procedure laid down by Article 218 TFEU. While both provisions are similar in the sense that the division of tasks between the Commission (which proposes and negotiates the agreement) and the

[19] For a long time, the EP lacked significant institutional memory in CCP issues. Its Committee on International Trade (INTA) came into existence in 2004 and, for a long time, had no working relations with the Commission's DG Trade. Moreover, the Commission intentionally avoided contacts with the INTA to prevent the politicisation of the CCP. The capacity of the European Commission stood in stark contrast with the Parliament. The Commission and the Council have had long working traditions, especially in the 133 Committee meetings and elsewhere under the rules of the EC Treaty (Kleimann, 2011).

[20] Note that other EU policies have undergone similar changes since the entry into force of the Lisbon Treaty.

Council (which authorises and concludes the agreement usually by QMV) is somewhat comparable, under Article 207(3) TFEU, the Commission is the only negotiator which is under the obligation to report regularly to the special committee and the European Parliament (Koutrakos, 2018). Significantly, the European Parliament can either approve or reject CCP agreements under Article 218(6)(a)(v) TFEU.

Article 207(3) TFEU

Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

Under Article 207(4) TFEU, the Council votes by qualified majority except for three cases:

- in the field of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules
- in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity
- in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

Apart from the agreements concluded in the context of the CCP and agreements on monetary policy (on the basis of Article 219 TFEU), the negotiation, conclusion and application of international agreements are laid down in Article 218 TFEU (Koutrakos, 2018, p. 1143). Article 218(2) TFEU provides that EU international agreements can only be negotiated after Council authorised this.

Article 218(2) TFEU

The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

Compared to the pre-Lisbon situation where the Commission was the only institution to submit proposals, Article 218(3) TFEU refers this matter to the Commission *or* the HR/VP.[21] Although the Treaty text is bit ambiguous over the role of negotiator, the Commission is almost always the Union negotiator, except for cases when an agreement exclusively relates to the CFSP. This reading is supported by Article 17(1) TEU which, among other things, provides that the Commission ensures the Union's external representation except for cases falling within the CFSP realm. The conclusion of international agreements is certainly an area where the Union should be represented externally – thus, practically the Commission will usually lead the negotiations (Eeckhout, 2011, pp. 195–196).

Article 218(3) TFEU

The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

The role of the Commission is further strengthened in Article 207(3) TFEU where it is expected to conduct trade negotiations that fall within the scope of the CCP. The key role of the Commission is not only guaranteed by Treaty provisions but is also underpinned by its vast expertise and institutional capacity built over the past decades as well as its extensive experience at the WTO/GATT (Kleimann, 2011, p. 15; Larik, 2020, p. 230).

The role of the Council in the negotiation of international agreements is by no means negligible either. The Council opens the negotiations and adopts directives for the negotiations. These directives usually contain general instructions for the negotiator, which may give the impression that the latter has significant power in pushing the negotiations in a particular direction, but the Council's special committees closely monitor the evolution of agreements. In the area of the CCP, such special committees are specifically designated.

Article 218(2) TFEU

The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

The European Parliament has two important prerogatives under current Treaty provisions. First, based on Article 218(10) TFEU, the EP "shall be immediately and fully informed at all stages of the procedure" and Article 207(3) TFEU requires the Commission to report regularly on the progress of negotiations to the Parliament (and to representatives of the Member States). In order to clarify what counts as "immediately and fully informed", an inter-institutional

[21] Note that in practice this is usually the Commission which is relevant in CCP matters.

agreement was concluded between the Parliament and the Commission which provides: "[i]n the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account".[22]

Article 218(10) TFEU

The European Parliament shall be immediately and fully informed at all stages of the procedure.

Despite concluding this inter-institutional agreement, practice showed that Article 218(10) TFEU may have different interpretations. In a 2014 judgment, the Court clarified the meaning of that provision within the context of an agreement between the EU and the Republic of Mauritius and held that the right of information should apply to all international agreements irrespective whether they fall within a CFSP or non-CFSP area. The Court held that Article 218 TFEU is "of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the [EU] in all fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedure".[23] Furthermore, the Court also held that "[i]f the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstances, on the Parliament's performance of its duties in relation to the CFSP, and therefore constitutes an infringement of an essential procedural requirement". Thus, informing the Parliament is a duty that applies across the policies, including the CFSP (Larik, 2014).

Second, the conclusion of international agreements requires parliamentary consent. Pre-Lisbon, although the conclusion of pure trade agreements under Article 300 EC Treaty did not require the assent procedure, the Parliament was requested to agree with all trade accords on a political – rather than legal – ground. Therefore, parliamentary rejection of trade agreements

[22] Framework Agreement on relations between the European Parliament and the Commission, 20 October 2010, P7_TA(2010)0366; paras 23-27 and Annex 3 deal with international negotiations; Annex 2 deals with Parliamentary access to classified information.
[23] Case C-658/11 [2014] Parliament v. Council, para 72.

was merely a theoretical option. After the entry into force of the Lisbon Treaty, however, there were two widely known cases where the European Parliament refused to give its consent: the Terrorist Finance Tracking Program (TFTP) agreement with the US and the multilateral Anti-Counterfeiting Trade Agreement (ACTA). Certainly, as Christina Eckes argued, these two cases "allowed the Parliament to step out of the shadow of inter-institutional cooperation and take the position of an internationally visible player" (Eckes, 2014, p. 923). It should be noted, however, that the EP's consent is unnecessary in cases of provisional application of international agreements which is done through a Council decision to authorise the provisional application following a proposal from the Commission (Larik, 2020, p. 233).

Article 218(6) TFEU (excerpt)

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for

In some cases, however, the conclusion of international agreements requires not only EU institutions ("EU-only" agreements) but also the signing and ratification by the Member States ("mixed" agreements). Since the entry into force of the Lisbon Treaty, more than 30 international agreements were signed as mixed agreements. Some of them appeared as key challenges for the EU, as demonstrated by the cases of the 2016 Dutch referendum on the EU-Ukraine Association Agreement and the 2016 "Wallonia saga" concerning the Comprehensive Economic and Trade Agreement (CETA). Indeed, a single Member State or sometimes a regional parliament can slow down or potentially hinder the conclusion of EU international agreements (see also Kaspiarovich & Levrat, 2021; Kaspiarovich & Wessel, 2022; Kleimann & Kübek, 2016; Levrat et al., 2022; Wessel & Loo, 2017). After Opinion 2/15 (post-Singapore), comprehensive free trade agreements are more often split up into a trade agreement (the scope of which is quite broadly defined by the CJEU and which is exclusively concluded by the Union) and investment agreements (which need to be concluded as mixed agreements).

Indeed, "EU-only" trade agreements may become the new norm in EU international agreements given that Treaty components ranging from trade in goods and services to transport services or commercial aspects of intellectual property could now be concluded by the EU without Member States' participation (Kleimann & Kübek, 2017).

For decades, EU trade instruments have also been used to promote non-trade objectives.[24] The nexus between foreign and trade policy has been visible in a number of EU instruments. Bilateral trade agreements have contained the so-called "essential element clauses" stipulating that respect for human rights and democratic principles forms the basis of the agreements. Since the 1989 Lomé IV Association Agreement, international trade (and cooperation) agreements can be suspended or terminated if third states do not respect human rights, the prohibition of weapons of mass destruction or good governance.[25] Given that the suspension is considered as a nuclear option, the EU has so far suspended only two agreements[26] and has developed more sophisticated human rights clauses. For instance, Articles 96 and 97 of the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries allow the EU to take "appropriate measures", including temporary cuts in aid (Ott & Van der Loo, 2018, pp. 238–239). In other cases, the EU offers (instead of restricts) market access in order to advance (geo-)political objectives, including for example with the conclusion of the Deep and Comprehensive Free Trade Agreements (DCFTAs) with Ukraine, Moldova and Georgia. Trade facilitation also takes place within the broader context of the Generalised Scheme of Preferences (GSP+) if certain conditions are met or in the form of the Autonomous Trade Measures (ATM) if the EU seeks to avoid legal restraints imposed by the WTO (Ott & Van der Loo, 2018, pp. 243–252).

Since the entry into force of the Lisbon Treaty, the link between trade and non-trade objectives has been further strengthened given that the CCP is now guided by the principles and values laid down in Articles 3(5) and 21(1) TEU. Another significant element in that regard is the empowerment of the European Parliament in the CCP which has emphasised its commitment to safeguard the strong link between trade and human rights. Thus, the CCP has shifted from a policy area protected by bureaucratic processes governed by the Commission to an area which is increasingly politicised and which is under the scrutiny of the European Parliament through legislative and consent procedures (Ott & Van der Loo, 2018, pp. 232–234; Van Elsuwege, 2020, pp. 416–417). Other trade measures with foreign policy purposes include, for

[24] The use of sanctions could be another example between the nexus of foreign and commercial policy. Sanctions are separately discussed in subsection 4.2.

[25] Note that the scope of the essential element clause has been broadened in the last couple of decades.

[26] In 1991, the bilateral trade agreement with the former Yugoslavia was suspended and, in 2012, a partial suspension of Cooperation Agreement with the Syrian Arab Republic (Ott & Van der Loo, 2018, p. 238).

example, the EU Minerals Regulation[27] that aims to prohibit trade in environmentally sensitive goods or the EU Seals Regulation[28] that aims to ban the import and sale of seal products.

Another example of the nexus between trade and foreign policy could be the export of dual-use goods which are products that can be used for both civil and military application. The Court already in the 1990s held that measures whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the CCP simply for the reason that they also pursued foreign and security policy objectives (Szép, 2019, p. 325). Therefore, a regulation setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items is adopted on the basis of Article 207 TFEU[29] and is regularly updated in an attempt to "respond to shifting foreign policy considerations and keep pace with new approaches to security" (European Commission, 2014).

More recently, two important trade initiatives are noteworthy. First, on the basis of Article 207 TFEU, in March 2019, the EU adopted a regulation establishing a framework for the screening of foreign direct investments into the Union that enables cooperation and the exchange of information on investments from non-EU countries that may affect security or public order. It includes the possibility for the Commission to issue opinions on such investments.[30] Second, the European Commission is currently developing an anti-coercion instrument that is expected to deter and counteract coercive practices by non-EU countries seeking to influence the decisions of the EU and its Member States in the area of trade and investment policy. Such practices reduce the EU's ability to adopt legitimate policy choices and undermine the EU's open strategic autonomy (European Commission, 2021f).

4.2 Sanctions Policy

The separation of EU external relations is not without difficulties: EU sanctions policy is perhaps one of the areas that best demonstrates how the legal differentiation of trade and foreign policy – otherwise areas extremely hard to disconnect from each other – lead to legal uncertainties and practical difficulties. In short, EU sanctions policy dates to the 1960s when Member States – due to the lack of Community competences – adopted measures through national legislation. In that period, the implementation of UN sanctions was mainly regarded as a foreign (not a commercial) policy issue. The role of the Commission was limited to

[27] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[28] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products.
[29] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2021 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.
[30] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

addressing the potential distortions of the Common Market in accordance with (current) Article 348 TFEU in cases where individual actions by the Member States seriously affected the functioning of market conditions. Accordingly, the Member States implemented UN Security Council Resolutions on Southern Rhodesia – called also the 'Rhodesian doctrine' (Portela, 2010) – through national legislation having regard to what is now Article 347 TFEU. In the 1980s, however, Member States gradually accepted, although not without reservations, that the use of sanctions had affected the Community's (wide) trade competences. Accordingly, Member States started to adopt sanctions on the basis of (current) Article 207 TFEU but nonetheless the imposition of such measures was preconditioned on a unanimously adopted political decision in the framework of the EPC. Since Maastricht, Treaties have expressly conferred competence on the EU to adopt sanctions with the aim to advance the EU's foreign and security policy objectives (Szép, 2019, pp. 322–328). Piet Eeckhout perfectly summarised the development of EU sanctions law as follows: "we have moved from Member State action, through the use of the common commercial policy, in conjunction with decisions in the framework of [EPC], to a specific legal basis in the EC Treaty, and now in the TFEU, for the adoption of sanctions, based on decisions taken within the CFSP" (Eeckhout, 2011, p. 502). By now, most CFSP decisions relate to the adoption (or modification) of sanctions (Wessel et al., 2021).

Indeed, the dual nature of (economic) sanctions is still reflected in the Treaty structure: the EU adopts economic and financial sanctions on the basis of Article 215 TFEU which is (still) preconditioned on a CFSP Council Decision adopted on the basis of Article 29 TEU. The EU can only adopt travel bans and arms embargoes on the sole basis of Article 29 TEU. In line with the decision-making rules in the framework of the CFSP, this Council Decision is always adopted by unanimity (see more on this in WP5.1). In rare cases, the decision-making procedure ends here, especially in cases in which the Council does not wish to interrupt or reduce, partly or completely, the economic and financial relations with third countries. For instance, in the case of the sanctions against the leadership of the Transnistrian region of the Republic of Moldova, in 2010 the Council merely adopted travel bans against those involved in the design and implementation of the campaign of intimidation and closure against Latin-script Moldovan schools,[31] and, therefore, it merely relied on Article 29 TEU. If, however, a Council Decision establishing a sanctions regime has economic or financial repercussions, the Council, acting by a qualified majority on a joint proposal from the HR/VP and the Commission, adopts a Council Regulation on the basis of Article 215 TFEU. Amending sanctions regimes also requires qualified majority based on Article 31(2) TEU.

In the last couple of years, a new trend has emerged in EU sanctions policy, partly in an attempt to avoid the politically sensitive situation to necessarily name a target country when imposing sanctions. The traditional way of establishing sanctions regimes has been to include the target's state name. In this way, the EU has sanctions regimes against Russia, Venezuela,

[31] Council Decision 2010/573/CFSP of 27 September 2010 concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010D0573-20201031

Belarus, etc. However, in parallel to this traditional way of establishing sanctions regimes, since 2018 the EU has established three new 'horizontal' sanctions regimes which target individuals and/or entities irrespective of their geographical locations. Specifically, the EU adopted a sanctions instrument to address the use of chemical weapons in 2018, another to address cyber-attacks in 2019 and a third one to respond to serious human rights violations in 2020. Politically, the way these horizontal sanctions regimes 'ease' the unanimity requirement is that EU Member States are not required to name and shame a specific country, which can be sometimes a highly sensitive political decision, but instead target individuals and entities irrespective of their locations (Eckes, 2021; Portela, 2019, 2021b, 2021c). It is clear, however, that establishing such horizontal sanctions regimes does not necessarily mean that they will spread quickly: the case of human rights sanctions has demonstrated that, at least from the first call of the EP, Member States needed almost ten years to establish that regime. Moreover, even when created, it was criticised that the new sanctions regime failed to refer to Sergei Magnitsky, whose death was the main motive behind the creation of such a regime. Country based sanctions and horizontal regimes continue to co-exist in the EU.

Another important development is the willingness of the European Commission, and in particular of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), to amend the current Blocking Statute,[32] the aim of which has been to protect EU operators from extra-territorial sanctions. The rationale behind the amendment of the Blocking Statute is that it has not been able to deter the US in the past few years from applying extra-territorial sanctions. US extraterritorial sanctions have limited the EU's strategic autonomy[33] and have restricted the EU in its policy choices. Moreover, the legal dimension has not worked either given many EU companies complain that the Blocking Statute put them between a rock and hard place: they either breached EU law (as the Blocking Statute makes it illegal for EU companies to comply with US sanctions) or risked their exclusion from US markets (Portela, 2021a, p. 3). Therefore, the European Commission published a Communication on the European Economic and Financial System in which it called for "additional measures to increase deterrence and, if needed, to counteract them" with the amendment of the Blocking Statute (European Commission, 2021a, p. 19). The updated Blocking Statute is expected to be published in April 2022 and, together with the EU's new anti-coercion instrument (European Commission, 2021d), is expected to better defend EU operators as well as the EU's (foreign) policy choices and its strategic autonomy. With similar objectives, the EU's new anti-coercion instrument is currently being developed by the Commission, the

[32] See the latest version: Consolidated text: Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based on thereon or resulting therefrom.

[33] The notion of strategic autonomy is often defined as the EU's "ability to act and cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary" (Council of the EU, 2016, p. 4).

main objective of which is to allow the EU to impose sanctions more easily on economic rivals that challenge the EU's strategic autonomy (see also Politico, 2021).[34]

4.3 Development Cooperation and Humanitarian Aid

Development cooperation and humanitarian aid are grouped together under Title III of Part Five of the TFEU. With the entry into force of the Lisbon Treaty, the objectives of development cooperation were reshuffled. On the one hand, there is now a stronger emphasis on the primary objective, that is the reduction of poverty, in Article 208(1) TFEU. On the other hand, the objectives are wider than the "primary" goal: some of the objectives laid down in Article 21(2) TEU can clearly be pursued by development cooperation means.

The EU, based on Article 4(4) TFEU, has shared competence in the areas of development cooperation and humanitarian aid. Pre-emption in these areas does not apply: as Article 4(4) TFEU states, "the exercise of that competence shall not result in Member States being prevented from exercising theirs". No wonder that primary EU law and the literature emphasises the complementary nature of development cooperation and humanitarian aid. Article 208(1) TFEU states that "[t]he Union's development cooperation policy and that of the Member States complement and reinforce each other". Complementarity within the context of development and humanitarian aid policy thus means that both the Member States and the EU can equally take actions and that actions taken at both levels are positively and mutually reinforcing. In other words, EU Member States remain visible actors in international development cooperation alongside the EU, without one excluding the other.

EU development policy ought to be coherent as well.[35] Coherence, from a wider perspective, could be translated as the willingness to avoid conflicts and to create positive synergies within EU development policy itself but also between development and other policy fields as well as all relevant actors and their instruments. Article 208(1) TFEU prescribes three different types of coherence: 1) coherence of EU development cooperation with the general principles and objectives of EU external relations; 2) other instruments need to contribute to the central policy goal of development cooperation, namely poverty reduction; and 3) other policy areas need to take into account the objectives of development cooperation. Furthermore, Article 208(2) TFEU requires the EU and its Member States to take into account the objectives approved at the international (e.g. UN) level.

[34] Note that some Member States voiced their concerns over the Commission's proposal on the anti-coercion instrument (Politico, 2021).

[35] See more on the notion of "coherence" in D10.1 "Towards Effective, Coherent and Sustainable EU External Action: Laying the Ground for the ENGAGE White Paper" and D6.2 and D6.3 on specific case studies in trade, development and humanitarian aid and traditionally internal policy areas.

Article 208 TFEU

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

In fact, the legal obligation of coherence has been part of primary EU law since the 1992 Maastricht Treaty and is known as the "Policy Coherence for Development" (PCD). The latter legal commitment was reaffirmed by the new European Consensus on Development adopted in June 2017 which stated that: "[t]he EU and its Member States will apply the principle of PCD and will take into account the objectives of development cooperation in all external and internal policies which they implement and which are likely to affect developing countries". PCD is expected to reduce incoherencies and, where possible, increase synergies between policies that impact developing countries. In the Commission, services work together on cross-cutting issues and the inter-service steering group, composed of representatives of all relevant Commission departments, has been assessing PCD and its implementation across EU policies since late 2017. EU Delegations also play a crucial role in that regard due to their involvement in political dialogues with partner countries where they acquire information on the impact of EU policies. From the EP side, there is a standing rapporteur for PCD and reports assessing its implementation. PCD is also widely discussed by the Council, mostly by Development Ministers and, at a lower level, by the Working Party on the 2030 Agenda for Sustainable Development (European Commission, 2019).

Coordination, finally, is the action-oriented dimension towards ensuring coherent and complementary policies, and can be defined as "activities of two or more development partners that are intended to mobilise aid resources or to harmonise their policies, programmes, procedures and practices so as to maximise the development effectiveness of aid resources" (Broberg, 2020, p. 249). The importance of coordination derives from the fact that EU development competences are complementary: both the EU and its Member States may act in this field. However, this is precisely why there is an obligation under Article 210 TFEU to coordinate and consult each other in an attempt to achieve vertical coordination between the EU and its Member States.

Article 210 TFEU

In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.

Although the main objective of the EU's development cooperation is to eradicate poverty, in practice, the EU pursues other policy objectives through development. For instance, the 2017 New European Consensus on Development sets the main objective of eradicating poverty but turns its attention to activities that normally fall under the CFSP, such as security but also migration (which is clearly a non-CFSP area). This willingness to pursue multiple objectives with development policy is reflected in the distribution of the EU's development assistance (Broberg, 2018, pp. 261–263). It is striking, as Table 2. shows, that only two of the top ten recipients (Afghanistan and Niger) are listed under the United Nations' (UN) "List of Least Developed Countries". It is also noteworthy that Turkey, as the number one recipient, is an upper-middle-income country and receives multiple times more resources than the second beneficiary Morocco. Moreover, eight out of the ten biggest recipients are located in the immediate neighbourhood of the EU where migration and stability are key issues (Broberg, 2018, pp. 263–264).

Table 2: Bilateral Official Development Assistance (ODA) to top ten recipients, 2014-15 average, EU institutions

Recipient	USD (millions)
Turkey	2,839
Morocco	475
Serbia	471
Tunisia	466
West Bank and Gaza Strip	446
Ukraine	365
Bosnia and Herzegovina	303
Afghanistan	276
Egypt	270
Niger	244

Source: Broberg (2018, p. 263)

Several other EU strategies and documents show a clear nexus between development cooperation and security. For instance, the 2013 Comprehensive Approach, which sets out guiding principles for EU external relations across all areas, makes it clear that long-term

development goals are pre-conditioned on the EU's assistance in the field of early warning and preparedness, conflict prevention, crisis response or peace-building (European Commission, 2013). Another example of the link between development and security could be the emphasise in the EU's Global Strategy on resilience, which is conditional upon education or culture. Furthermore, at the implementation phase, civilian missions often pursue both security and development objectives given the widespread view that these factors are inextricably linked together (Broberg, 2018, pp. 265–266).

Humanitarian aid is often closely linked to development assistance. Humanitarian aid gained specific legal basis with the entry into force of the Lisbon Treaty, but the EU started providing humanitarian assistance decades ago. For instance, in 1969, an aid programme was launched in the context of the Yaoundé II Convention. In 1992, the European Community Humanitarian Office (ECHO) was established to "manage humanitarian actions for the benefit of the populations of all third countries suffering from natural disasters or exceptional events requiring swift response or the implementation of accelerated procedures" (Van Elsuwege & Orbie, 2014, pp. 21–22). Even if humanitarian aid progressively evolved within the EU in the 1990s, the Maastricht Treaty did not include a single reference to humanitarian aid. Instead, in 1996, a Regulation was adopted to provide a legal framework for humanitarian policy. This 1996 Regulation that sets out the main goals, principles and procedures for implementing EU humanitarian aid highlights that "the sole aim of [this policy area] is to prevent or relieve human suffering" and "is accorded to victims without discrimination on the grounds of race, ethnic group, religion, sex, age, nationality or political affiliation".[36] Humanitarian aid increasingly grew in importance in EU external relations and by the end of the last decade it represented about 10% of total EU external aid (Versluys, 2008, p. 208). However, for a long time, it could hardly be separated from political considerations and from foreign policy goals. The idea of a more independent humanitarian aid policy that is separated from foreign policy considerations was floated during the drafting of the Constitutional Treaty. In the late 2000s, this led the Council to adopt the four principles of humanitarian aid: neutrality, impartiality, humanity and independence (Orbie et al., 2014, pp. 158–159).

The idea of a more autonomous humanitarian aid policy culminated in the current EU Treaty framework. Humanitarian aid is now a policy in its own right that currently belongs to one of the shared competences of the EU. However, as is the case with EU development cooperation, pre-emption does not apply either: Article 4(4) TFEU provides that "the exercise of that competence shall not result in Member States being prevented from exercising theirs". Based on Article 214(4) TFEU, both the Member States and the EU can conclude international agreements with third countries and international organisations in the field of humanitarian assistance. The reason for maintaining parallel EU and Member State actions in this field is that Member States wish to remain visible actors in this area. Moreover, parallel actions can achieve better results, partly because the EU and the Member States can share their technical or financial means (Van Elsuwege & Orbie, 2014, p. 29). The complementary nature of this

[36] Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid.

policy area is echoed in Article 214(1) TFEU which provides that: "[t]he Union's measures and those of the Member States shall complement and reinforce each other".

With its own provisions and objectives, the Lisbon Treaty underlines the separate nature of humanitarian aid (Van Elsuwege & Orbie, 2014, p. 21). According to Article 214(1) TFEU, humanitarian aid provides for "ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations". Such disasters can range from floods to earthquakes, from civil wars to state failures. Humanitarian aid is quite different from other EU policies and instruments. Compared to the solidarity clause in Article 222 TFEU which can be used for disaster relief,[37] humanitarian aid is limited to emergencies in third countries. It is also different from development cooperation under Article 208 TFEU because humanitarian aid is designed to provide ad hoc support whereas development cooperation aims for long-term and structural assistance. Also, unlike EU civil protection, which can be used to provide technical assistance (e.g. firefighting or pumping capacity), humanitarian aid is confined to addressing humanitarian needs. And finally, EU humanitarian aid cannot facilitate or support CFSP crisis management operations given that the former "shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination" (Van Elsuwege & Orbie, 2014, pp. 31–32). Based on Article 214(2) TFEU,[38] humanitarian aid can only be activated if it respects international (humanitarian) law and the principles of impartiality, neutrality and non-discrimination. In this sense, these principles exclude the possibility to advance political, military or economic objectives of the EU's external actions listed under Article 21 TEU (Van Elsuwege & Orbie, 2014, p. 35).

Despite the independence of the EU's humanitarian aid policy, there is a clear link between this policy area and the CFSP/CSDP. CSDP has repeatedly been used to tackle crisis and post-crisis situations, including in Darfur between 2005 and 2007, or in Mali since 2013, where the EU has provided humanitarian aid. In other cases, CSDP missions and operations themselves supported humanitarian objectives. For instance, EU NAVFOR Atalanta was launched, among other things, for "the protection of vessels of the [World Food Programme] delivering food aid to displaced persons in Somalia" (Cañamares, 2018, p. 281). Another example is the EUFOR Chad/Central African Republic that between 2008 and 2009 facilitated humanitarian aid delivery and the free movement of humanitarian aid workers. Part of the reason why there is a need for strengthening the nexus between the CFSP and other external policies is that state fragility not only threatens security of citizens but is also a menace for their well-being.

[37] See more details on Article 222 TFEU in D4.1 'The current legal basis and governance structures of the EU's defence activities'.

[38] Article 214(2) TFEU provides that: "Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination".

Institution-building is a central character of the EU's external action that requires different tools from the EU's side (Cañamares, 2018, pp. 280–282).

5 Sectoral Policies with an External Dimension

5.1 Competition Policy

The history of competition law dates to the establishment of the European Coal and Steel Community (ECSC). Under pressure from the US, Treaty drafters sought to create a "trans-European" model of competition law by introducing specific provisions in the ECSC Treaty: Article 65 banned cartels, while Article 66 included a provision on concentrations (Papadopoulos, 2010). The 1957 Rome Treaty established a system safeguarding free competition in the common market. Since the early days of European integration, competition policy has been used to preserve and foster the European economy based on fairness and trust. The aim of EU competition policy has been to safeguard the proper functioning of the EU's internal market by ensuring that firms operating in European markets compete on equal terms. The rationale behind this policy area has been clear and simple: competition leads to better prices and quality in goods and services and even contributes to innovation. Competition was also believed to increase productivity and to create necessary conditions for economic growth. Competition, however, could be distorted in a number of ways: coordination of actions, exploiting dominant market positions, merging entities, providing state aid or discrimination against certain economic actors in public procurement – just a few of the many examples of unfair practices (Szczepański, 2014, pp. 3–4). Today, Article 3(3) TEU states that the EU "shall establish an internal market based on a highly competitive social market economy". Based on Article 3 TFEU, the EU has exclusive competence in establishing competition rules necessary for the functioning of the internal market. Currently, the rules on competition are governed by Articles 101 to 109 TFEU.

Since the 1980s, as a result of increased globalisation, the external dimension of competition policy has become a priority. Specifically, one of the main challenges arising from the internationalisation of economic activities affecting multiple markets was how competition authorities shall deal with firms whose headquarters did not necessarily coincide with their place of activity (Papadopoulos, 2010, p. 47). Given the increasing international investments of firms, the application of competition laws in different jurisdictions may have overlapped and even come into conflict. In such cases, investigations on different competition rules may lead to uncertain results. No wonder the EU has increasingly sought to establish cooperation and convergence in national competition rules (Damro & Guay, 2016, pp. 89–90). Indeed, Joaquín Almunia, former Commissioner responsible for Competition Policy, also emphasised the need for global convergence and argued that:

> [i]n the age of global business, it no longer makes sense to have competition enforcement confined within national boundaries. We will always need a diversity of approaches to reflect our specific institutional features and traditions; but we also need to be able to work with each other on cases that straddle many jurisdictions. Reducing – and eventually eliminating – conflicting rules in the

> different jurisdictions can bring only benefits to business and to competition authorities. And of course, we will eventually benefit consumers. Conflicting rules are bad for business, because they often translate into higher compliance costs for companies. A global level playing field – in contrast – gives firms more transparency and predictability. (Almunia, 2010).

The EU has also widely used its trade agreements to export its *acquis*, including competition rules. This externalisation was quite visible regarding "new" Member States that joined the EU in 2004/07 whose commitment to implement EU competition rules was strongly supervised by the Commission, in particular by DGs Competition and Enlargement. Europe Agreements concluded with Central and Eastern European states prescribed the full acceptance of EU competition law as laid down by primary and secondary EU law as well as the case law of the ECJ. The enlargement of the EU thus implied the geographical expansion of EU competition law (Van den Bossche, 2014, p. 373). The EU still has specific arrangements with candidate countries. For example, Stabilisation and Association Agreements concluded with Western Balkan countries contain provisions on state monopolies, competition or public undertakings.[39] The most important multilateral general agreement exporting EU competition rules is the Agreement on the establishment of the European Economic Area (EEA). The unique feature of EEA competition rules is their lasting homogeneity with EU competition rules which follows mainly from the explicit commitment of EFTA States to interpret competition provisions in accordance with relevant ECJ rulings. Homogeneity in applicable rules is further guaranteed by Article 58 EEA which ensures a dynamic adaptation of competition rules (Van den Bossche, 2014, p. 375). The EEA Agreement contains specific provisions on competition, mainly Articles 53 to 64, which are similar to those found in TFEU provisions. The Commission has been given exclusive jurisdiction to deal with all merger cases with an EU dimension.

The export of EU competition rules is not limited to the EU's close neighbourhood. With the establishment of cooperation with non-EU competition authorities, the EU aims to enforce its competition policy with other jurisdictions to promote convergence of policy tools and practices. Between 2010 and 2017, the Commission cooperated with external competition agencies in 65% of all cartel cases and in 54% of complex merger cases. According to a recent report, "[t]he number of cartel cases involving an external participant has increased by 450% since 1990 and mergers with external companies more than doubled between the late 1990s and 2010" (Szczepański, 2019, p. 16). In this wider context, the level of cooperation usually varies from country to country but the EU usually seeks to coordinate enforcement actions, mutual notification of cases, sharing of information, competition policy dialogue and building up of common capacities (Szczepański, 2019).

The EU concludes bilateral agreements with competition provisions or memoranda of understanding (MoU) with a number of trading partners. Compared to candidate or EEA states,

[39] See, for example, Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part.

the EU's primary objective is not to expand EU competition rules but to reduce the risk of divergence or incoherence. Such dedicated agreements exist between the EU and Brazil (1999), Canada (1999), China (2004, 2012), Japan (2003), Korea (2009), the Russian Federation (2011) and the US (1991, 1995, 1998) (Van den Bossche, 2014, p. 377). In addition to this web of bilateral agreements, the EU has engaged to varying degrees in negotiations over competition policy in multilateral venues, including the United Nations Conference on Trade and Development, the Organisation for Economic Cooperation and Development, the World Trade Organisation and the International Competition Network. Because competition policy is an exclusive competence of the EU, DG Competition often plays the pivotal role in such venues, with the notable exception of the World Trade Organisation, where a potential link between competition policy and trade policy can be problematic (Damro, 2006).

While the external dimensions of competition policy have grown over time as a result of increased globalisation, the potential linkages to other policy areas beyond trade also face limitations, especially if those other policy areas are seen (by DG Competition) as more politicised than competition policy. Likewise, there are rare exemptions to the exclusive competence of competition policy, which may create obstacles to linking with other policy areas, including CFSP/CSDP. For example, Article 346(1)(b) TFEU has been used by the Member States to retain jurisdiction over mergers with a military significance. A list of the products covered by Article 346(1)(b) is contained in a Council decision of 1958. The provision is interpreted strictly, and it is for the Member State seeking to rely on it to prove that it is necessary to have recourse to it in order to protect its essential security interests.

5.2 Health

Organising public health services is primarily the responsibility of the Member States. Indeed, citizens expect states to organise health care as an expression of solidarity. At the same time, the EU, based on Article 4(2)(k) TFEU, has shared competence in common safety concerns in public health measures and, based on Article 6(a) TFEU, the EU has "supporting, coordinating and supplementing" competence in the protection and improvement of human health. Article 168(1) TFEU was strengthened by the Lisbon Treaty that now affirms that the EU must take into account the "protection of human health" in all its policies and activities. The substantive scope of EU competence in this field has moved away from disease prevention to health promotion, including both physical and mental health. The bringing together of pre-existing EU competences in health policy under Article 168 TFEU should not be underestimated. The EU's explicit health competences under Article 168 TFEU now range from EU legislation on the quality and safety of pharmaceuticals and medical devices to endorsement of EU (non-harmonising) measures about tobacco and alcohol (Hervey & McHale, 2015, p. 42).

At the same time, Articles 168(5) and (7) make it clear that the Union still has a limited role in public health:

Article 168(5) TFEU

The European Parliament and the Council […] may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

Article 168(7) TFEU

Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.

The external dimension of EU health policy has been growing in the past decades. Well before the COVID19 pandemic, health was increasingly seen as a policy area with a global dimension. In the early 1990s, EU primary law already contained the explicit competence of "foster[ing] cooperation with third countries and the competent international organisations in the sphere of public health" (Hervey & McHale, 2015, p. 445). In 2002, the EU emphasised within the framework of its development policy the need for "a single Community policy framework to guide future support for health, AIDS, population and poverty within the context of overall EC assistance to developing countries" (European Commission, 2002, p. 2). The 2006 Oslo Ministerial Declaration – issued by the Ministers of Foreign Affairs of Brazil, France, Indonesia, Norway, Senegal, South Africa and Thailand – is considered a milestone due to its explicit recognition that "health as a foreign policy issue needs a stronger strategic focus on the international agenda" (Ministers of Foreign Affairs, 2007, p. 1). In the field of health policy, the European Commission's strategic approach for 2008-2013 sought to strengthen the EU's voice in global health and declared that "[i]n our globalised world it is hard to separate national or EU-wide actions from global policy, as global health issues have an impact on internal Community health policy and vice versa" (European Commission, 2007, p. 6; see also Steurs et al., 2018, p. 2).

After the entry into force of the Lisbon Treaty, given the more explicit EU competences under Article 168 TFEU, the Commission was determined to strengthen the external dimension of EU law that would interact with (other) external policies, including trade or development policy. In fact, the "mainstreaming provision" under Article 168(1) TFEU – "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities" – applies to the EU's external actions. The internal and external aspects of health were perhaps most visible in the 2010 Commission's communication on the "EU Role in Global Health" in which it stated "the EU should apply the common values and principles of solidarity towards equitable and universal coverage of quality health services in all external and internal policies and actions" (European Commission, 2010, p. 5). However, other EU institutions did not resonate with the Communication published by the European Commission and EU external relations (law) continued without the EU taking a holistic approach in (external) health law (Hervey & McHale, 2015, pp. 445–446).

Thus, the EU's role in global health law is still limited but is increasingly recognised, especially in the areas of international trade and development policy (Hervey & McHale, 2015). There are, however, some boundaries that the EU needs to respect: apart from Article 6 TFEU that provides a complementary EU role in public health, Article 207(4)(b) TFEU provides that health services (but not public health) are subject to unanimous voting in the Council. Article 207(6) TFEU provides that the CCP "shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation". Health is certainly a field to which Article 207(6) TFEU applies (Hervey & McHale, 2015, p. 459). Article 168(7) TFEU also puts particular limits on the EU since it "shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them" (see also De Ruijter, 2018).

Nevertheless, the EU has played a significant role in norm-setting in the domain of public health, particularly in its trade relations either because products may affect population health (food, alcohol, tobacco) or because certain products are used within health care systems (e.g. pharmaceuticals or medical devices) (Hervey & McHale, 2015, p. 457). Given that trade in goods and services may have an impact on public health (ranging from tobacco to pharmaceuticals), public health is increasingly present in the EU's international relations. Within this context, the EU's role in the United Nations Food and Agriculture Organization (FAO), including its membership in the Codex Alimentarius Commission (CAC), is often highlighted, the main aim of which is to harmonise standards for the health and safety of food. Another example includes the WTO Agreement on Technical Barriers to Trade which, among others, contains requirements on food within the context of protecting public health (De Ruijter, 2018).

Given that health policy is a strong Member State competence, EU competence under Article 207 TFEU may be significantly constrained once it reaches into health policy and it may be required to conclude mixed agreements (instead of "EU-only" agreements). Indeed, the WTO Agreement on Sanitary and Phytosanitary Measures was ratified by both the EU and its Member States. Also, in the area of health services, the practice of adopting mixed agreements is expected to continue despite the EU's broadened competences in CCP matters. However, other trade agreements which contain provisions on specific public health scares, such as the mad cow disease or the dioxins in pork, were concluded as "EU-only" agreements with the US, Australia or New Zealand (Hervey & McHale, 2015, pp. 457–460).

Through the EU's contribution to the Millennium Development Goals (MDS), the second area that is affected by increasingly important EU health law is development cooperation. The MDS include public health concerns and global health inequalities and raise the issue of combating HIV/AIDS, malaria and tuberculosis. Within this context, the main objective of reducing poverty under Article 208 TFEU could also be understood as a recognition that poverty is both the cause and the result of poor health. For instance, the Cooperation Agreement with the Republic of India covers EU financial support for projects, including public health with the main focus on primary health care. Other development cooperation agreements with some Southern

American or Asian countries include provisions on illegal trade in narcotics which is central to the interface between global health and criminal justice. Another important part of the EU's development policy concerns access to essential medicines and the challenge of falsified medicines (Hervey & McHale, 2015, pp. 463–469). In November 2021, EU development ministers addressed the growing immunisation gap between developed and developing countries and agreed to work together to end the COVID-19 pandemic everywhere and for everyone. HR/VP Josep Borrell also announced that "we need to build on the Global COVID-19 Summit to ensure that we meet our joint objective of a 70% global vaccination rate by the United Nations General Assembly next year" (Council of the EU, 2021).

The COVID-19 pandemic highlighted the need for a new approach to health and security (ECFR, 2021) and that the health system is an element of security as much as defence or telecoms infrastructure. The lack of health prevents nations from competing in the geopolitical system and societies from pursuing normal functions. Several components have been identified as a necessary pre-condition for health sovereignty, including early warning systems, supply chain resilience, medical research and development or strengthened cyber security (Hackenbroich et al., 2020). Within this context, in mid-2021, the Commission published its Communication on "Drawing the early lessons from the COVID-19 pandemic" in which it highlighted that the "global health security system was not able to provide the data and the steer with the speed and authority needed for containment" which raises "the need to strengthen the global health security architecture", in particular to strengthen the WHO in that regard (European Commission, 2021b). Also, the coronavirus pandemic has pushed the EU towards improving preparedness to better respond to serious cross-border health threats more effectively which led Commission President von der Leyen to announce new measures to create a European Health Union. Thus, in November 2021, the Commission proposed "a solid framework for EU preparedness, surveillance, risk assessment, early warning and response. [These] proposals will give the EU and Member States stronger tools to take quick, decisive and coordinated action together: new crisis mandates for the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA), as well as a revamped cross-border health threat legal framework" (European Commission, 2021g).

5.3 Environment

Although the 1957 Rome Treaty did not confer on the European Economic Community an express competence on environmental issues, the EU's actions in the field of environmental policy have a decades-long history. As a first tangible measure, after the 1972 Stockholm Conference on the Human Environment, the EU recognised the importance of environmental protection. In the same year, Heads of State and Government agreed to move forward in this policy area even in the absence of any Treaty legal basis and subsequently the First Programme of Action on the Environment was adopted in 1973. The Single European Act was the first primary law that had a specific title on environment which included an explicit competence in external environmental relations, but the exercise of those powers was subject to unanimous decision-making in the Council. It was also in the 1980s that the EU took over the US leadership in environmental issues given its willingness to protect biodiversity or to regulate GMOs

(Kelemen & Vogel, 2010). The 1993 Maastricht Treaty represented another major shift as it placed environment among the core objectives of the EU: it referred to a "harmonious and balanced development of economic activities" and to "sustainable and non-inflationary growth respecting the environment". It also included the precautionary principle, one of the principles of international environmental law, and the objective of "promoting international measures to deal with regional or worldwide environmental problems". The 1999 Amsterdam Treaty reformulated some provisions of the Maastricht Treaty and referred to internationally accepted notions, such as sustainable development and the high-level protection and improvement of the quality of the environment. The Amsterdam Treaty was also important from a procedural side: it introduced co-decision as the decision-making procedure in this field (Durán & Morgera, 2012, pp. 9–13).

Although the EU has had global ambitions in environmental policy for decades, the entry into force of the Lisbon Treaty has represented yet another shift in the process of further "internationalising" the EU's environmental policy. In its general objectives, the Lisbon Treaty linked sustainable development and EU external relations: Article 3(5) TEU provides, among other, "[i]n its relations with the wider world, the Union […] shall contribute to […] sustainable development of the Earth". Similarly, Article 21(2)(e) TEU now provides that the EU should facilitate the development of "international measures to preserve and improve the quality of the environment and the sustainable management of natural resources". The Lisbon Treaty also singles out climate change as the main issue in global environment policy where the EU ought to promote international cooperation (Durán & Morgera, 2012).

Currently, Article 191(1) TFEU lays down the objectives of the EU's environmental policy. The first three objectives have existed since the Single European Act, while the fourth one was included by the Maastricht Treaty and was further revised by the Lisbon Treaty.

Article 191(1) TFEU

Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

- protecting human health,

-prudent and rational utilisation of natural resources,

-promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Article 191(2) TFEU further provides several principles that specifically apply in the exercise of EU competence in environmental issues, including a high level of environmental protection, prevention, precaution and rectification at the source as well as the polluter pays principle. The objectives and principles laid down in Article 191 TFEU are broadly defined and, therefore, the boundaries of the EU's environmental policy are hard to delineate. This stems from the desire

to keep this policy area flexible enough to adapt itself quickly to needs and changes in the global environmental agenda. Moreover, within the limits of international law, the EU is also empowered to take actions beyond its own borders. Although the international environmental landscape is continuously changing, there have been some objectives that the EU has pursued for decades: for instance, it has played an important role in the global fight against climate change since the 1980s. The fight against climate change, which also stems from the explicit formulation in Article 191(1) TFEU, is reflected at the institutional level: in 2010, DG Climate Action was established within the Commission to specifically tackle that issue. Another EU priority has been the Seventh Environment Action Programme (2014-2020) in which the EU committed itself to the protection of biodiversity, sustainable forest management and sound management of chemicals (Durán, 2020, pp. 366–369; Durán & Morgera, 2012, pp. 13–14).

Environment policy is one of the shared EU competences according to Article 4(2)(e) TFEU. EU Member States, however, sought to exclude the potential pre-emptive effects of this policy area and introduced Article 191(4) TFEU to ensure their prerogatives in this domain. Furthermore, given that Member States may also wish to become contracting parties of international agreements covering environmental matters, their right under Article 193 TFEU guarantees the possibility to introduce, compared to EU-level legislation, more stringent measures at the Member State level (Durán & Morgera, 2012, pp. 17–19). In this way, Member States are enabled to adopt their own measures even if the EU has already exercised its own competences in this field. Thus, the EU often adopts minimum standards and the Member States can go beyond those measures domestically. From a procedural perspective, the EU adopts its own measures through the ordinary legislative procedure (where the Council acts by qualified majority) covering also action programmes that set key EU priorities in the area of environment. However, as Article 192(2) TFEU underlines, unanimity is applied in certain areas (Durán, 2020, pp. 369–370).

Article 191(4) TFEU

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.

The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 193 TFEU

[EU environmental legislation and action programmes] not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

Article 192(2) TFEU

[…] the Council [acts] unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

In order to assert global leadership in the fight against climate change, the EU has acted at multiple levels of governance. It has either entered multilateral, regional or bilateral agreements or has adopted its own unilateral measures. On a bilateral level, agreements with third countries usually contain provisions on environmental standards. This also serves the EU's interest in reducing the chances of transboundary environmental pollution. The enlargement process also helps the EU advance its environmental policy objectives given that candidate states are required to implement the EU's *acquis*. At a multilateral level, the EU is a party to all major Multilateral Environmental Agreements (MEAs) and has been a signatory to approximately 60 MEAs, including 30 Conventions or Agreements (Delreux, 2018; Keukeleire & Delreux, 2014, pp. 228-229). The EU has also sought, for example, to strengthen the multilateral framework for climate change under the United Nations Framework Convention on Climate Change (UNFCCC), although with mixed results.

The EU has positioned itself as a leading actor in this field and has sought to "lead by example", by adopting domestic emission reduction measures in an attempt to show its commitment to fight against climate change and to demonstrate the feasibility of these types of measures. For a long time, the challenge was that only a few developed countries mirrored EU legislation in this field. Therefore, there has been a clear shift in how the EU has sought to influence the global dimension of environmental issues. This started to change about a decade ago when the EU started to use its material power to influence other states' practices in this field. For instance, in the area of aviation, since 2012, flights arriving at or departing from an EU airport have been obliged to surrender emission allowances within the framework of the European emissions trading scheme. This obligation applies not only in relation to the journey that takes place within European airspace but along the entire journey. Another example could be the

banning of credits from controversial industrial gas projects or the introduction of sustainability criteria for biofuels (Kulovesi, 2012, pp. 115–116; Scott, 2011, pp. 25–29).

The strong nexus between foreign and security policy and environmental issues are increasingly present in high level political discussions. For instance, the UN's Secretary-General António Guterres emphasised in his opening remarks to the UN Environment Annual report 2016 that: "[m]any conflicts are triggered, exacerbated or prolonged by competition over scarce natural resources; climate change will only make the situation worse. That is why protecting our environment is critical to the founding goals of the United Nations to prevent war and sustain peace" (UNEP, 2016). Indeed, it is estimated that 40% of internal conflicts since 1990 have been interconnected with natural resources (Kettunen et al, 2018, p. 7). Climate change has at least two main security components. First, stronger climate change policies can lead to a less energy-dependent EU: the more it will be able to reduce greenhouse gas emissions, the less fossil fuels it will need and the less import it will need from gas and oil rich states, such as Russia or the Middle East. Second, the EU currently takes less into account that the consequences of climate change, such as desertification, may generate tensions over natural resources, such as water. This may destabilise different parts of the world which in turn have security consequences that may be required to be tackled through military or humanitarian policy means (Keukeleire & Delreux, 2014, pp. 229-230). One of the biggest foreign policy achievements of the EU was to convince Russia to ratify the Kyoto Protocol in exchange for the EU's support for Russia's WTO membership. In other areas, the EU has less tangible success but is rather able to set the global agenda in certain issues. One key challenge that the EU faces is that climate negotiations take place beyond the above-mentioned UNFCCC framework and the EU lacks presence in these new multilateral fora (Keukeleire & Delreux, 2014, p. 231).

6 Conclusion

This Working Paper has explored the current legal basis and governance structures of the EU's "external action plus". In our understanding, the notion of "external action plus" not only includes foreign, security and defence, trade, sanctions policy, development cooperation or humanitarian aid but also EU sectoral policies with an external dimension. In line with this definition, this Working Paper has also presented the external dimension of some internal policy areas, including competition, health and environment. Our starting point was that the Lisbon Treaty has introduced a number of important reforms, including institutional changes but also improvements in the Treaty provisions. Among others, these cover the dual role of the HR/VP and the creation of the permanent president of the European Council but also the introduction of a single set of objectives under Article 21(2) TEU and the newly worded Article 40 TEU. Certainly, all these elements have contributed to more coherent and effective EU external action.

However, the Working Paper has also demonstrated that the EU's external action is still fragmented. On the one hand, the CFSP (along with the CSDP) continue(s) to be placed in the TEU, whereas all other external actions are defined by the TFEU, including trade, sanctions, development cooperation and humanitarian aid. This is particularly striking given that the latter policy areas often pursue broader foreign and security policy objectives and are sometimes difficult to disentangle from the overarching aims of the CFSP. Therefore, the adoption of a comprehensive Union legal act may need a combination of, sometimes, incompatible legal bases. Coherence in the field of external actions thus remains a challenge and may lead to controversial legal disputes between EU institutions and/or the Member States. Indeed, political compromises have led to sub-optimal legal constructions that in turn hamper the attainment of the more holistic external ambitions of the Union. Moreover, the uncertainties may lead to less effective external action: while the choice of correct legal basis continues to be of constitutional significance, efficient policy making is faced with internal debates (between the Union and its Member States and/or between the Union institutions) which may delay much needed Union actions to tackle external crises. Sectoral policies with external dimensions are not even included or referred to in Part V of the TFEU on the Union's external action despite, as the Working Paper has demonstrated, they all have external dimensions.

Certainly, EU policymakers should realise that while traditional foreign and security policy issues will continue to exist, some of the current external challenges can only be tackled effectively if the EU uses its "external" but also its "internal" competences in a comprehensive manner. In other words, the EU should avoid seeing the CFSP or its other "external" policies as the only viable ways to take actions externally. Instead, it should also creatively use its "internal" policies and tools to promote its interests globally. This is especially the case when one thinks about some of the current challenges that the EU faces, including climate change, migration or global health within the context of the on-going COVID-19 crisis. None of these challenges belong to the EU's traditional "external" policies but at the same time all of them require the EU to realise that some of the contemporary global challenges go beyond our traditional and somewhat narrow understanding of security.

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ENGAGE

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